

DECISION OF THE OREM CITY BOARD OF ADJUSTMENT ON THE APPEAL BY HOLIDAY OIL OF OREM CITY'S DETERMINATION THAT THE SITE PLAN APPLICATION AND FINAL PLAT APPLICATION SUBMITTED FOR REVIEW ON AUGUST 21, 2023, WAS INCOMPLETE

Procedural Posture

Applicant Holiday Oil ("Holiday") appeals the determination by Orem City ("City") that its site plan application and final plat application ("Application") for property located at 1981 South Geneva Road ("Property") was incomplete because the traffic impact study ("TIS") required by the City did not meet City ordinances. Holiday timely appealed the City's decision to the Orem Board of Adjustment ("Board"). The Board held a meeting on November 29, 2023, to gather the evidence in this matter and now makes the following decision.

Relevant Facts

Based on the evidence in the record, the Board makes the following factual findings:

- On August 16, 2023, the City filed an application to amend Article 22-5-3(A) and the Zoning Map to rezone the Property from the C2 Zone to the PO (Professional Office) Zone.
- Under City ordinances an item is considered to have been "formally initiated...upon the consideration of such proposal by the Planning Commission at a regularly scheduled meeting." (See Orem City Ordinance 22-1-5(E)) The City's application was scheduled to be heard by the Orem City Planning Commission on September 6, 2023.
- On August 21, 2023, Holiday Oil submitted its Application for review. The Application included a TIS. City Staff processed the Application and began its review.
- On August 28, 2023, the Office of Orem City Mayor and City Council sent a letter to residents of the surrounding neighborhood which characterized Holiday's Application as "a complete application." The Orem City Attorney's Office reviewed the letter before it went out to the residents. Holiday received this letter on August 30, 2023.
- On August 29, 2023, Holiday received a packet of redline comments from the "City of Orem DRC." There is a transportation section in the redline packet, but the only comment in the section is "Submit the TIS to UDOT for review and approval." Absent from the redline packet is notice of an insufficient TIS.
- On September 5, 2023, Holiday submitted a revised Application responding to the August 29 redline packet received from the "City of Orem DRC".
- Prior to September 6, 2023, there is no evidence that the City notified Holiday its Application was incomplete.
- On September 6, 2023, the Planning Commission considered the City's zone change application and forwarded a positive recommendation to the Orem City Council.
- Sometime after September 6, 2023, the City determined that Holiday's TIS was insufficient because it failed to meet City ordinances.

- On September 20, 2023, the City notified Holiday that its Application was incomplete. Absent from the record is an explanation for the City's delay in making the determination of incompleteness.

Analysis

The dates in this case are of particular importance. When the City filed an application on August 16 to rezone the Property from C2 to PO, the vested rights "clock" started ticking. Because City ordinances identify "the consideration of [a] proposal by the Planning Commission at the regularly scheduled meeting" as the "formal initiation" of the legislative process (See City Ordinances 22-1-5(E)) for purposes of the pending legislation doctrine, the September 6, 2023, Planning Commission meeting effectively became Holiday's vested rights deadline. If Holiday submitted a complete Application before September 6, then its right to have the Application reviewed under the land use regulations in effect on that date would be vested (See Utah Code 10-9a-509) and any subsequent change to the zoning would only apply prospectively.

In this case the Board concludes that as of September 6, 2023, Holiday's application was complete for purposes of its vested rights. The Board's conclusion is based on the following evidence: On August 28, 2023, a letter to the neighbors issued by the "Office of the Mayor and City Council" explained that although "the Orem City Council strongly opposed the project and took aggressive action...unfortunately, Holiday Oil submitted a **complete application** on August 21, 2023, **for a site plan that is consistent with the existing zoning regulations** and, as a result, Orem City had to accept the application and will have no other option than to approve it if the City process is followed." (emphasis added). During testimony at the November 29 meeting, the City admitted that this letter was reviewed by the City Attorney's Office before being issued. The Board finds that when a letter is: i) issued on official "Office of the Mayor and City Council" letterhead; ii) reviewed by the City Attorney's Office; and iii) contains legal conclusions such as "Holiday Oil submitted a 'complete' application" it is indicative of the City's determination that the Application was complete—especially in the absence of any evidence that the City provided notice to Holiday prior to September 6 to the contrary.

Next, when the "City of Orem DRC" returned the packet of redlines on August 29 without any notice to Holiday that the TIS was insufficient, the Board finds that this is also evidence indicative of the City's determination that Holiday's Application was complete.

The City argues that because Holiday's Application had not yet been reviewed by, and the packet of redlines was not produced by, the "real" DRC, but a review committee internally referred as the "technical" DRC, the Application could not have been considered complete. When pressed on this argument at the November 29 meeting, the City went even further and argued that the City does not consider *any* application complete until all redlines are resolved and the "real" DRC votes at its public meeting to forward an application to the Planning Commission. There are two problems with the City's reasoning. First, City ordinances do not identify a "technical" DRC as a separate review committee apart from the "real" DRC. There is nothing in the record to indicate that there is an official delineation between the "technical" DRC and the "real" DRC. The packet of redlines returned to Holiday on August 29 is titled "City of Orem DRC." There is no indication, annotation, footnote, etc. on the document that informs

a developer that the packet of redlines are not from the “real” DRC. There is nothing to alert a developer that the City has not yet determined whether an application is complete as it moves forward in the development review process.

Next, the City’s position is inconsistent with its own ordinances. Orem City Code 22-14-20(C) “Approval Process” says the following: “The Department of Development Services shall forward a **complete** site plan request to the Development Review Committee (DRC) members for review.” (emphasis added). From the objective evidence on the record, this is what happened in this case. Holiday’s application was forwarded to the DRC for review who subsequently returned redline comments via a document entitled “City of Orem DRC” that required Holiday’s response and follow up. Additionally, the ordinance makes no mention that all redlines must be resolved and that a vote by the “real” DRC forwarding the application to the final approving authority is required before the City considers an application complete.

Finally, the record contains no evidence of extraordinary circumstances that prevented the City from making a determination prior to September 6 that Holiday’s Application was incomplete. When asked for an explanation of why it took until September 20 to inform Holiday that its Application was incomplete, the City’s answer was that the Application was still being reviewed by the Development Services and Legal departments. The Board finds this explanation insufficient given the importance of the September 6 Planning Commission meeting. The record is clear that the communication between City staff and Holiday was ongoing and Holiday’s Application review was proceeding efficiently. Consequently, the lack of evidence excusing the City’s failure to inform Holiday prior to September 6 that its Application was incomplete is conspicuous. Allowing the City to engage in such a practice leaves an applicant in limbo as to whether its application is ever truly complete and therefore its developmental rights vested. It is fundamentally unfair to allow the City to postpone the decision on whether Holiday’s Application was complete until after the deadline for securing vested rights had passed.

Conclusion

The Board finds that prior to the City’s September 6 Planning Commission meeting, the City considered Holiday’s Application complete based on: i) the City’s letter of August 28; ii) the packet of redlines returned by the City of Orem DRC on August 29; and iii) the City’s failure to notify Holiday prior to September 6 that its Application was incomplete.

Based on the above, the Board finds that the City’s determination after September 6 that Holiday’s application was incomplete, was arbitrary, capricious, and/or illegal. The City’s determination is therefore reversed and Holiday’s appeal is granted.

The City is ordered to proceed with review of Holiday’s site plan application and final plat application as described in City ordinances. The Board’s secretary is directed to comply with Orem City Ordinance 2-16-13 as it pertains to the Board’s decision.

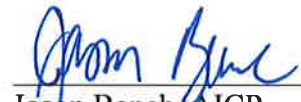
December 13, 2023

Orem City Board of Adjustment

PASSED and APPROVED this 13th day of December 2023.


CITY OF OREM, by
Karen Jeffreys, Chair

ATTEST:


Jason Bench, AICP
Assistant Development Services Director

BOARD MEMBERS VOTING

BOARD OF ADJUSTMENT MEMBER	AYE	NAY	ABSTAIN	RECUSE
Ott Dameron	☐	☐	☐	☒
Paul Crossett	☒	☐	☐	☐
Carlos Iglesias	☒	☐	☐	☐
Karen Jeffreys	☒	☐	☐	☐
Leslie Nelson	☒	☐	☐	☐